SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court for the Eastern District of Pennsylvania

No. 16064. March term, 1931

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DIST. OF PENNSYLVANIA

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

Docket entries

Mar. 18, 1931, Praecipe to issue summons, filed.
Mar. 18, 1931, Summons exit—returnable 1st Monday in April.
Mar. 18, 1931, Statement of claim, filed.
Mar. 18, 1931, Notice to file affidavit of defense, filed.
Apr. 9, 1931, Summons returned—on March 27, served each defendant, and filed.
Dec. 11, 1931, Affidavit of defense by National Surety Company, filed.
Dec. 31, 1931, Motion for judgment for want of sufficient affidavit of defense, filed.
Dec. 31, 1931, Praecipe to enter rule for judgment for want of sufficient affidavit of defense, filed.
2 Jan. 25, 1932, Argued sur rule for judgment for want of sufficient affidavit of defense.
Apr. 13, 1932, Opinion, Kirkpatrick, J., adjudging affidavit of defense to be sufficient, filed.
July 20, 1932, Praecipe to enter judgment for defendant, filed.
July 20, 1932, Suggestion of death of Joseph S. MacLaughlin and requesting the substitution of Albert H. Ladner, collector of internal revenue, filed.
July 21, 1932, Certificate of probable cause, filed.
July 26, 1932, Judgment in favor of defendants, filed.
Sept. 14, 1932, Assignments of error, filed.
Sept. 14, 1932, Petition for appeal, filed.
Sept. 14, 1932, Order of court granting appeal, filed.
Sept. 14, 1932, Exception and order of court granting exception, filed.
Sept. 14, 1932, Citation allowed and issued.
Sept. 14, 1932, Praecipe for transcript of record sur appeal, filed.
Sept 14, 1932, Copy of notice of appeal, filed.
Sept. 20, 1932, Citation returned—service accepted—and filed.

3 In United States District Court

[Title omitted].

Plaintiff's statement of claim

Filed March 18, 1931

The plaintiff, by Paul Freeman, assistant United States attorney for the eastern district of Pennsylvania, complaining of the defendants, alleges:

I

That the plaintiff is a citizen of the United States and of the State of Pennsylvania, and resides at Philadelphia, in the county of Philadelphia, State of Pennsylvania.

II

That the defendant Philadelphia Barge Company was at all times hereinafter mentioned and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was at such times, and now is authorized to engage in business in the State of Delaware, and also in the State of Pennsylvania, and
4 has a post-office address and place of business, at which it may be served with process, at 211 Mariner and Merchant Building, 308 Chestnut Street, city and county of Philadelphia, in the State and eastern judicial district of Pennsylvania, and within the jurisdiction of this court.

III

That the defendant National Surety Company was at all times herein mentioned, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and authorized to engage in business in that State and also in the State of Pennsylvania, and was, and is now, so engaged, and has a place of business at which it may be served with process at Packard Building, in the city and county of Philadelphia in the State and eastern judicial district of Pennsylvania within the jurisidiction of the court.

IV

At the time of the signing, sealing, and delivery of the writing obligatory hereinafter set forth and thereafter until August 1, 1921, Ephraim Lederer, named therein, was the collector of internal revenue of the United States for the first collection district of Pennsylvania, and as such collector was charged with the collection in said district of taxes due to the internal revenue laws of the United States; that on or about July 31, 1921, said Ephraim Lederer resigned his office and was succeeded directly in said office as collector,

by Blakely D. McCaughn, and said Blakely D. McCaughn retained his said office until December 31, 1927, and was succeeded in said office by W. E. Brown, who had said office, and had and performed the duties of said collector from January 1, 1928, until May 31, 1928. On June 1, 1928, Joseph S. MacLaughlin became, and since said date he has been and now is, the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania, and, as such collector, by virtue of his said office, said Joseph S. McLaughlin was charged and now is charged with the collection of taxes due under the internal revenue laws of the United States in said first collection district, and with all the other duties to said office pertaining.

V

Joseph S. MacLaughlin is now the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania, and he is one of the successors of said Ephraim Lederer in said office, and, as such, is charged with all the duties pertaining thereto, and with all the rights, privileges, and duties of said office, and, inter alia, with all the rights that formerly vested in said Ephraim Lederer under the writing obligatory hereinafter set forth. Said Joseph S. MacLaughlin is likewise charged with the collection in said district of all moneys due the United States under the internal revenue laws of the United States, and under all bonds given in connection therewith.

VI

That the United States is a corporation sovereign and body politic.

VII

That this is a suit arising under an act of Congress providing for internal revenue.

6

VIII

That the Commissioner of Internal Revenue assessed, on the list of assessments for October 1920, against the said Philadelphia Barge Company an additional corporation income and profits tax of $12,635.00 on account of income and profits received by it during the calendar year ended December 31, 1918.

IX

That on or about February 15, 1921, and said Philadelphia Barge Company, being then so assessed, filed with the collector of internal revenue of the first collection district of Pennsylvania a claim for abatement of the said tax.

X

That on or about February 17, 1921, at the city and county of Philadelphia, State of Pennsylvania, in connection with the filing of its said claim for abatement, and in consideration that the collector refrained from and suspend the immediate collection of the tax assessed as aforesaid, pending, a finding by the Commissioner of Internal Revenue of the amount due, in respect to its said claim for abatement the defendant, Philadelphia Barge Company, by J. P. Tierney, its president, attested, by D. T. Sheridan, its secretary, as principal, and the defendant, National Surety Company, by Chas. Lloyd, resident and vice president, attested by Mary A. Heym, resident assistant secretary, as surety, signed, sealed with the corporate seals of the respective defendants and delivered to Ephraim Lederer, collector of internal revenue, first district of Pennsylvania, a writing obligatory or bond, whereby the said Philadelphia Barge
7 Company and National Surety Company firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally to pay to said Ephraim Lederer, collector of internal revenue, first district of Pennsylvania, or his successors, the sum of twelve thousand, six hundred thirty-five dollars ($12,635).

Said writing obligatory contained a condition, in substance, that the Philadelphia Barge Company claimed the income and profits tax assessed against it to be unreasonable, and if the principal should on notice and demand by the collector duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve per centum per annum from the time such tax would have been due had no claim for abatement been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then the obligation to be void, but otherwise to remain in full force and virtue.

A copy of said writing obligatory is hereto annexed, made a part hereof the same as fully rewritten herein, and marked "Exhibit A" for convenience of reference.

XI

That after the execution and delivery of said writing obligatory, or bond, the Commissioner of Internal Revenue considered said claim for abatement and, on or about May 14, 1923, rejected the same in the full amount thereof, and found the correct amount of tax to be as assessed, $12,635.00; that thereupon, on said May 14, 1923, notice of the finding of the Commissioner in respect to said claim for abatement and of the amount of tax due was given to the Philadelphia Barge Company and demand made of it by the collector of
8 internal revenue, first district of Pennsylvania, for payment of said sum of $12,635.00 with interest, but said defendant failed, neglected, and refused, and still fails, neglects and refuses to pay said amount, or any part thereof.

XII

That on or about May 20, 1926, the collector of internal revenue, first district of Pennsylvania, gave notice to the National Surety Company, defendant, of the finding of the Commissioner of Internal Revenue in respect to said claim for abatement and of the neglect, failure, and refusal of the Philadelphia Barge Company to pay on notice and demand by the collector, the amount found due by the Commissioner, and demanded that it, the said National Surety Company, pay the said sum of $12,635.00 so found due. Said National Surety Company, notwithstanding said notice and demand has wholly failed, neglected and refused to pay said $12,635.00, or any part thereof, and does so still refuse, neglect, and fail.

XIII

That by reason of the foregoing, said writing obligatory has become absolute, and pursuant to the terms thereof, the defendants are, and each of them is, indebted to the plaintiff in the sum of $12,635.00 with equal interest thereon from the 20th day of May, 1926.

Wherefore, the plaintiff prays judgment against the said Philadelphia Barge Company and National Surety Company, and each of them, in the sum of twelve thousand, six hundred, thirty-five dollars ($12,635.00) with interest at six per centum per annum from May 20, 1926, and costs herein.

PAUL FREEMAN,
Asst. United States Attorney,
Attorney for Plaintiff.

9 [Duly sworn to by Joseph A. MacLaughlin, jurat omitted in printing.]

Exhibit "A" to statement of claim

Know all men by these presents, that Philadelphia Barge Company, as principal, and National Surety Company, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto Ephraim Lederer, collector, first district, Pennsylvania, or his successors, in the sum of twelve thousand six hundred thirty-five ($12,635.00) dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the Philadelphia Barge Company claims that the
10 income and profits tax assessed against it is unreasonable and unjust to it and should not be demanded.

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve percent per annum from the time such

tax would have been due had no claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations then the obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this seventeenth day of February 1921.

PHILADELPHIA BARGE COMPANY,
By J. P. TIERNEY [SEAL]
President.

Attest:
D. T. SHERIDAN,
Secretary.

NATIONAL SURETY COMPANY,
By CHAS. LLOYD [SEAL]
Res. Vice Pres.

Attest:
MARY A. HEYM,
Res. Asst. Secty.

Signed, sealed, and delivered in the presence of J. M. Malmead, Dorothy Lipschitz.

Bond approved this second day of May 1921.

Collector of Internal Revenue.

11 In United States District Court

Affidavit of defense

Filed December 11, 1931

STATE OF NEW YORK,
City and County of New York, ss:

A. C. Millikan, being duly sworn according to law, deposes and says that he is vice president of National Surety Company, one of the defendants named in the above-entitled proceeding; that he is authorized to execute this affidavit of defense for and on behalf of the said company, and avers that the said National Surety Company has a just, true, complete, and legal defense to the whole of the plaintiff's claim of the following character and nature, to wit:

1. The averments of paragraph 1 are admitted.

2. Defendant denies that the Philadelphia Barge Company was, at the time of the filing of the statement of claim in the above-entitled proceeding or at any time subsequent thereto, a corporation existing under and by virtue of the laws of the State of Delaware, and avers that the said company has not been in existence at any time since January 1923, at which time its charter was forfeited by the State of Delaware for nonpayment of taxes. Defendant denies that the said Philadelphia Barge Company was authorized to engage in business in the State of Delaware or the State of Pennsylvania at the

time of the filing of the said statement of claim in the above-entitled proceeding or at any other time subsequent to January 1923, and further denies that it had a post-office address and place of business in the city and county of Philadelphia, State of Pennsylvania, or at any other place at which it might be served with process at the
12 time of the filing of the said statement of claim, or at any other time subsequent to January 1923.

Defendant further avers that the said Philadelphia Barge Company was not at the time of the beginning of the above-entitled proceeding, or at any time subsequent thereto, within the jurisdiction of this court.

3. The averments of paragraph 3 are admitted.

4. The averments of paragraph 4 are admitted.

5. It is admitted that Joseph S. MacLaughlin is now the duly appointed, qualified, and acting collector of internal revenue of the United States for the first collection district of Pennsylvania. It is denied that the said Joseph S. MacLaughlin is vested with any rights under the said writing obligatory for the reasons hereinafter set forth.

6. The averments of paragraph 6 are admitted.

7. The averments of paragraph 7 are admitted.

8. Defendant admits the Commissioner of Internal Revenue assessed against the Philadelphia Barge Company an additional income and profits tax amounting to $12,635 for the calendar year ending December 31, 1918. Defendant denies, however, that the said tax was assessed against the said Philadelphia Barge Company on account of income and profits received by it during the said calendar year, in that the said corporation did not have or receive sufficient income or profits during the said year to warrant an additional income and profits tax in the said amount, as is hereinafter set forth.

13 9. The averments of paragraph 9 are admitted.

10. Defendant admits that on or about February 17, 1921, the Philadelphia Barge Company as principal and the National Surety Company as surety signed, sealed with their respective corporate seals and delivered to Ephraim Lederer, then collector of internal revenue for the first district of Pennsylvania, an instrument, referred to in plaintiff's statement of claim as a bond or writing obligatory, a copy of which is attached to said statement of claim and marked "Exhibit A." Defendant denies, however, that by said instrument the Philadelphia Barge Company and the National Surety Company bound themselves, their heirs, executors, administrators, and assigns unto Ephraim Lederer, collector as aforesaid, or his successors, in the sum of $12,635, or in any other sum or amount, in that there was no consideration for the signing, sealing, and delivering of the said instrument by the said Philadelphia Barge Company and the said National Surety Company. Defendant

denies that the consideration of the signing, sealing, and delivering of the said instrument was that the said Ephraim Lederer, collector as aforesaid, would refrain from and suspend the immediate collection of the said tax assessed as aforesaid pending a finding by the Commissioner of Internal Revenue of the amount due in respect to the claim for abatement filed by the said Philadelphia Barge Company, and avers that the said collector could have taken such steps as he deemed necessary for the collection of the said tax immediately after the said instrument was signed, sealed, and delivered as aforesaid and at all time subsequent thereto.

14 Defendant admits that the Philadelphia Barge Company not only claimed that the said income and profits tax assessed against it as aforesaid was unreasonable, but also claimed that it was illegal and without warrant or authority in law, and further admits that the said instrument contained a condition to the effect that if the principal should, on notice and demand by the collector, duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of twelve percent per annum from the time such tax would have been due had no claim for abatement been filed, and should otherwise well and truly perform and observe all the provisions of law and the regulations, then the obligation to be void, but otherwise to remain in full force and virtue.

11. Defendant denies that the Commissioner of Internal Revenue considered that the said claim for abatement after the execution and delivery of the said instrument or at any other time. Defendant is advised, believes, and therefore avers that after the execution of the said instrument, the Commissioner of Internal Revenue requested the said Philadelphia Barge Company to submit additional information in support of the said claim for abatement and because of the failure of the said company to submit the requested information, the said claim for abatement was rejected in the full amount thereof.

Defendant denies that the correct amount of the tax for the year 1918 was $12,635 and denies that the said Commissioner of Internal Revenue found or could find this amount to be legally and properly due for the said year.

15 Defendant avers that the said Commissioner of Internal Revenue, in determining the net taxable income of the said Philadelphia Barge Company for the year 1918, upon which net taxable income the said additional assessment of tax is based, allowed depreciation on barges owned by the said company during the said year at the rate of only three percent per annum. Defendant is advised and therefore avers that all of the said barges owned by the said Philadelphia Barge Company during the year 1918 were acquired by the said company during the year 1916 and were secondhand barges at the time of acquisition by the said Philadelphia Barge Company. Defendant is advised and therefore avers that during the year 1918 the said Philadelphia Barge Company

owned four wooden barges and that a proper rate of depreciation on the said barges for the said year was eighteen and three-quarters percent. Defendant is advised and therefore avers that in determining the net taxable income of the Philadelphia Barge Company for the year 1918 there should have been allowed a deduction for depreciation on barges amounting to $8,761.31 instead of $3,302.72, the amount allowed by the said Commissioner of Internal Revenue in arriving at the said additional assessment of tax against the said Philadelphia Barge Company for the year 1918.

Defendant denies that on May 14, 1923, notice of the finding of the said Commissioner in respect to the said claim for abatement and the amount of tax due was given to the said Philadelphia Barge Company and demand made upon the said company for payment of the said tax with interest, in that the said Philadelphia Barge Company was not then in existence, its charter having been for-
16 feited during January of 1923. Defendant admits that the said Philadelphia Barge Company has failed, neglected, and refused, and still fails, neglects, and refuses to pay the said tax or any part thereof in that the said Philadelphia Barge Company is out of existence and has been out of existence since prior to the beginning of the above-entitled proceeding. Defendant further avers that neither the said tax nor any part thereof is properly or legally due for the said year.

12. Defendant admits the averments of paragraph 11 of the statement of claim and avers that the said tax in the amount of $12,635 is not legally or properly due for the said year for the reasons set forth in paragraphs 10 and 11 hereof and in paragraphs 14 to 19, inclusive.

13. Defendant denies that the said writing obligatory has become absolute, and further denies that the said defendants named in this proceeding, or either of them, is indebted to the plaintiff in the sum of $12,635 with interest thereon from May 20, 1926, or any other amount.

14. As a separate and further defense, defendant avers that the writing obligatory or bond filed with Ephraim Lederer, collector as aforesaid, on February 17, 1921, was given for the purpose of better securing the said collector of internal revenue for the payment of whatever additional income and profits tax was found properly and legally due from the Philadelphia Barge Company for the year 1918, provided, of course, that the said tax was assessed and collection thereof made within the proper statutory period as provided by the internal revenue acts properly applicable thereto.

17 15. Defendant avers that in this proceeding plaintiff is endeavoring to collect an additional income and profits tax assessed against the Philadelphia Barge Company for the year 1918.

16. Defendant avers that the said Philadelphia Barge Company duly filed its income and profits tax return for the calendar year 1918 in the office of the then collector of internal revenue for the

first district of Pennsylvania on April 29, 1919, and further avers that the above-entitled proceeding was not instituted until the 18th day of March 1931.

17. Defendant is advised, believes and therefore avers that under the provisions of section 250 (d) of the Revenue Act of 1918, section 250 (d) of the Revenue Act of 1921, and section 278 (e) of the Revenue Act of 1924, the plaintiff in this proceeding was, on the date when the proceeding was instituted, barred from beginning any suit or proceeding against the Philadelphia Barge Company and/or the National Surety Company for the collection of the tax for which this suit was instituted.

18. As a separate and further defense, defendant is advised, believes and therefore avers that under the provisions of section 1106 of the Revenue Act of 1924 the liability of the Philadelphia Barge Company and the National Surety Company, for the enforcements of which this proceeding was instituted, was extinguished prior to the beginning of the said proceeding and there is therefore no liability on the part of either the Philadelphia Barge Company or the National Surety Company to pay the tax, or any part thereof, for the collection of which the above-entitled proceeding was instituted.

18 19. As a further defense defendant avers that suit in assumpsit on the identical bond which is set forth as exhibit A to the statement of claim was brought by one Blakely D. McCaughn on August 6, 1926, as collector of internal revenue for the first district of Pennsylvania against the same defendants, in the United States District Court for the Eastern District of Pennsylvania, as of June term, 1926, no. 12356; that on September 30, 1930, judgment was entered in favor of the said Blakely D. McCaughn and against the defendant National Surety Company for want of a sufficient affidavit of defense. That the said Blakely D. McCaughn resigned as collector on December 31, 1927, and that upon December 13, 1930, a suggestion of abatement of cause of action and a rule to show cause why the judgment should not be stricken off and the cause of action abate were filed in accordance with section 11 of the act of February 13, 1925 (c. 229, 43 Stat. 941). That thereafter on December 22, 1930, a decree was entered by the said court striking the said judgment from the record by reason of the fact that the action upon which the said judgment was rendered had abated prior to the entry of the said judgment.

20. That if there was a cause of action upon the said bond the same has been lost by failure to comply with the said act. That the cause of action upon the said bond is by reason of the said order res adjudicata as by reference to the record in the said proceeding will more fully and at large appear.

Wherefore defendant National Surety Company claims it is not indebted to the plaintiff in any sum whatsoever.

19 All of which above-stated facts are true and correct to the best of affiant's knowledge and belief, and defendant expects to prove same upon the trial of this cause.

(Sgd.) A. C. MILLIKAN.

Sworn to and subscribed before me this 8th day of Dec., A.D. 1931.

(Sgd.) WM. M. WEAVER,
Notary Public.

In United States District Court

Motion for judgment for want of sufficient affidavit of defense

Filed Dec. 31, 1931

And now, to wit: Dec. 29, 1931, comes Edward W. Wells, United States attorney for the eastern district of Pennsylvania, the attorney for Joseph S. MacLaughlin, the plantiff above named, and sets forth that the affidavit of defense filed on behalf of the National Surety Company in the above-entitled case is insufficient in law in that it admits:

1. The assessment of the income-profits tax in the sum of $12,635 against the Philadelphia Barge Company, one of the defendants above named, for the year 1918 by the Commissioner of Internal Revenue.

2. The filing by the said Philadelphia Barge Company with the collector of internal revenue of its claim for the abatement of said taxes on February 15, 1921.

3. The signing, sealing, and delivery of the bond upon which suit was instituted.

20 4. That the said bond contained a condition to the effect that if the principal should, on notice and demand by the collector, duly pay any part of such tax found by the Commissioner to be due, with interest at the rate of 12 percent per annum from the time such tax would have been due, had no claim for its abatement been filed, and should otherwise well and truly perform and observe all the provisions of law and regulations, then the said bond to be void; otherwise to be and remain in full force and virtue.

5. That the said claim for abatement by the Philadelphia Barge Company was rejected by the Commissioner.

6. The failure, neglect, and refusal of the Philadelphia Barge Company to pay the amount of tax found by the Commissioner to be due after notice to pay the same had been given.

7. That the said National Surety Company, on or about May 20, 1926, received notice of the neglect, failure, and refusal of the said Philadelphia Barge Company to pay the said tax,

and denies only:

1. The corporate existence of the Philadelphia Barge Company at the time suit was brought; service of process upon it and presence

in the jurisdiction of this court at the time suit was brought and since that time.

2. That the Philadelphia Barge Company has sufficient income to warrant the assessment of an additional tax for the year 1918.

21 3. That the plaintiff has a right to sue on the bond in question for the reason that the statute of limitations for the collection of taxes bars the suit.

4. That the taxes were regularly found to be due in that certain depreciations should have been allowed by the Commissioner.

5. That this matter is res adjudicata in that suit was instituted in the same court as of June term, 1926, to recover the aforesaid sum of $12,635, the plaintiff therein being Blakely D. McCaughn, then collector of internal revenue for the first collection district of Pennsylvania; that judgment was entered on behalf of the plaintiff in the aforesaid sum together with interest in 1930; that upon showing that the aforesaid Blakely D. McCaughn resigned as collector of internal revenue for the first collection district of Pennsylvania in 1927 the judgment in this case was stricken off and cause of action abated.

6. That there was a failure to comply with the act of February 13, 1925 (c. 229, 43 S. [illegible] 941).

The affidavit of defense is otherwise insufficient.

The plaintiff above named therefore, by his said attorney, moves that a rule be granted upon the National Surety Company, one of the defendants above named, to show cause why judgment should not be entered for the plaintiff for the full amount of its claim for want of a sufficient affidavit of defense.

EDWARD W. WELLS,
United States Attorney.

22 In United States District Court

Rules for judgment

Filed Dec. 31, 1931

Enter rule for judgment for want of sufficient affidavit of defense. Returnable January 25, 1932, at 10 o'clock a.m.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

Clerk, U. S. D. C., E. D. of Pa.

In United States District Court

Opinion sur motion for judgment for want of sufficient affidavit of defense

Filed April 13, 1932

KIRKPATRICK, *J.:*

The only question raised by this affidavit of defense is whether the cause of action is abated, the affidavit of defense being the statutory equivalent of a plea in abatement.

The suit is against principal and surety upon a bond given to secure payment of taxes. The bond was delivered to Lederer, then collector, on February 17, 1921, and the obligee is "Ephraim Lederer, Collector, First District, Pennsylvania, or his successors." Lederer resigned as collector July 31, 1921, and was succeeded by McCaughn. On August 6, 1926, McCaughn, then in office, brought an earlier suit upon this same bond. During the pendency of that suit McCaughn went out of office, December 31, 1927. He was succ-
23 ceeded by Brown, who acted until May 31, 1928, when he in turn was succeeded by MacLaughlin, the present collector. No substitution as provided for by the act of February 8, 1899, as amended up to February 13, 1925, U. S. C. A., title 28, section 780, was made within six months after the expiration of McCaughan's term.

McCaughan was the proper plaintiff in the former suit, and, if no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue, in spite of the fact that he is not the obligee in the bond. Judge Hand in Bowers vs. American Surety Company, 30 Fed, (2d) 244, and following Tyler vs. Hand, 7 How. 572, accepts the theory of fictional personality which recognizes the office as a legal person and, upon grounds of policy and convenience, I think his view should be followed. He says. "Of the convenience of recognizing an office as a legal person in cases like that at bar there can be no question; the purpose of such bonds is to create an obligation in favor of the incumbents, as they succeed each other."

But in this case we have already had one suit brought by a successor of the original obligee, which suit was abated by reason of the failure of the Government to make substitution in compliance with the act of 1925, after the plaintiff had left office. Was there an abatement of the cause of action as well as of the writ? I think that it was the clear intent of the act of 1925 that there should be.

It will be noted that the act does not provide that the cause may be continued as a matter of right after the plaintiff has left
24 office by a mere formal substitution of his successor. The act says that if certain things are satisfactorily shown to the court it shall be competent for the court to permit the cause to be continued and maintained by the successor in office. Suppose the court, properly exercising the discretion thus given, decides against permitting the cause to be continued. To hold that the cause of action was not abated would mean that after the court had so refused to permit a substitution the abatement could be avoided and the act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector.

Such futile legislation is not presumed to have been in the mind of Congress. The act could have been only upon the theory that the cause of action abated. In addition there is no injustice in refusing to permit parties to be harassed by the necessity of defending more than one suit for the same cause of action when a very simple pro-

cedure is offered for the continuance to a conclusion of the action as originally brought.

The affidavit of defense is adjudged to be sufficient.

By the Court,
Wm. H. Kirkpatrick, *J.*

In United States District Court

Suggestion of death

Filed July 20, 1932

And now, to wit: this 18th day of July, 1932, comes Edward W. Wells, Esq., United States attorney in and for the eastern
25 district of Pennsylvania, and suggests the death of the above plaintiff, and requests the substitution of Albert H. Ladner, present collector of internal revenue as plaintiff in the above-entitled action.

Edward W. Wells,
United States Attorney.

In United States District Court

Praecipe for judgment

Filed July 20, 1932

Enter judgment in favor of the defendant and against the plaintiff in the above-entitled action, in accordance with the opinion filed April 13, 1932.

Edward W. Wells,
United States Attorney.

To the clerk, U.S.D.C. E. D. of Pa.

In United States District Court

Judgment

Filed July 26, 1932

Before Kirkpatrick, J.

And now, July 26, 1932, in accordance with the opinion of the court and by praecipe filed, judgment is hereby entered in favor of defendants and against the plaintiff, Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania.

By the Court.

Attest:
(Sgd.) E. G. Johnson,
Deputy Clerk.

26 In United States District Court

Certificate of probable cause

Before Kirkpatrick, J.

And now, to-wit: this 21st day of July 1932 the court, on motion of the United States attorney for the eastern district of Pennsylvania, representing the plaintiff in the above-entitled cause, hereby certifies that there was probable and reasonable cause for the act of said plaintiff, as collector of internal revenue, in demanding and collecting from the above defendant, the internal-revenue tax, for the refund of which a judgment has been entered in favor of the said defendant.

BY THE COURT.

Attest:
LEO A. LILLY,
Deputy Clerk.

In United States District Court

Exception

Filed Sept. 14, 1932

And now, to wit: this 14th day of September 1932 the plaintiff, Albert H. Ladner, collector of internal revenue for the first collection district of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, by his attorney, Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, excepts to the action of the court, in his opinion of April 13, 1932, adjudging affidavit of defense to be sufficient, and in holding that the cause of action had abated.

(Sgd.) EDWARD W. WELLS,
United States Attorney.
(Sgd.) THOMAS J. CURTIN,
Assistant U.S. Attorney.

27 *Order allowing exception*

And now, to wit: this 14 day of September 1932, the above exception is allowed.

(Sgd.) W. H. KIRKPATRICK, *J.*

In United States District Court

Assignment of errors

Filed Sept. 14, 1932

And now, to wit: this 14th day of September 1932, comes Albert H. Ladner, collector of internal revenue for the first collection dis-

trict of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, plaintiff, and by his attorney, Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, makes and files this his assignment of errors:

1. The learned trial judge erred in finding as follows:

"No substitution as provided for by the act of February 8, 1899, as amended up to February 13, 1925, U.S.C.A., title 28, sec. 780, was made within six months after the expiration of MacLaughlin's term."

2. The learned trial judge erred in finding as follows:

"If no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue."

3. The learned trial judge erred in finding as follows:

28 "Judge Hand in Bowers vs. American Surety Company, 39 Fed. (2) 744, and following Tyler vs. Hand, 7 How. 572, accepts the theory of fictional personality which recognizes the office as a legal person, and upon grounds of policy and convenience, I think his views should be followed."

4. The learned trial judge erred in finding as follows:

"Which suit was abated by reason of the failure of the Government to make substitution in compliance with the act of 1925 after the plaintiff left office."

5. The learned trial judge erred in finding as follows:

"Was there an abatement of the cause of action as well as of the writ? I think that it was the clear intent of the act of 1925 that there should be."

6. The learned trial judge erred in finding as follows:

"It will be noted that the act does not provide that the cause may be continued as a matter of right after the plaintiff has left office by a mere formal substitution of his successor. The act says that if certain things are satisfactorily shown to the court it shall be competent for the court to permit the cause to be continued and maintained by the successor in office."

7. The learned trial judge erred in finding as follows:

"Suppose the court, properly exercising the discretion thus given, decides against permitting the cause to be continued. To hold
29 that the cause of action was not abated would mean that after the court had so refused to permit a substitution, the abatement could be avoided and the act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector."

8. The learned trial judge erred in finding as follows:

"Such futile legislation is not presumed to have been in the mind of Congress. The act could have been only upon the theory that the cause of action abated."

9. The learned trial judge erred in finding as follows:

"In addition there is no injustice in refusing to permit parties to be harassed by the necessity of defending more than one suit for

the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought."

10. The learned trial judge erred in refusing to sustain plaintiff's motion for judgment for want of sufficient affidavit of defense.

11. The learned trial judge erred in refusing to direct the entry of judgment in favor of the plaintiff and against the defendant.

12. The learned trial judge erred in dismissing plaintiff's motion for judgment for want of a sufficient affidavit of defense.

13. The learned trial judge erred in directing the entry of judgment for the defendant.

30 14. The learned trial judge erred in adjudging defendant's affidavit of defense sufficient.

15. The learned trial judge erred in not adjudging defendant's affidavit of defense insufficient.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Petition for appeal

And now, to wit: this 14th day of September, 1932, comes Albert H. Ladner, collector of internal revenue for the first collection district of Pennsylvania, substituted plaintiff for Joseph S. MacLaughlin, now deceased, former collector of internal revenue, feeling himself aggrieved by the judgment entered herein on July 26, 1932, in favor of the defendant and against the plaintiff, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, and that upon the service of a citation said appeal may operate as a supersedeas until the final disposition of the cause by the United States Circuit Court of Appeals, Third Circuit, and in support of this petition, petitioner hereby presents his assignment of errors, and prays that said case may be certified to the said Circuit Court of Appeals for the Third Circuit.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

31 *Order allowing appeal*

Before Kirkpatrick, J.

And now, to wit: this 14th day of September, 1932, it is ordered that the appeal be allowed as prayed for.

By the court:

(Sgd.) W. H. KIRKPATRICK.

In United States District Court

Præcipe for record

Filed Sept. 14, 1932

To the Clerk of the Court:

Prepare transcript of the record in the above-entitled case for filing in appeal to the Circuit Court of Appeals, and include the following:

Docket entries.

Statement of claim.

Affidavit of defense by National Surety Company.

Motion for judgment for want of sufficient affidavit of defense.

Præcipe to enter rule for judgment for want of sufficient affidavit of defense.

Opinion Judge Kirkpatrick adjudging affidavit of defense to be sufficient.

Suggestion of death of Joseph S. MacLaughlin, requesting the substitution of Albert H. Ladner, collector of internal revenue.

Judgment in favor of defendants.

Certificate of probable cause.

Exception.

Assignment of errors.

32 Petition for appeal.

Order allowing petition for appeal.

Clerk's certificate.

and no others.

(Sgd.) EDWARD W. WELLS,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

[Clerk's certificate to foregoing transcript omitted in printing.]

33 [Minute entry of argument and submission, Dec. 9, 1932, omitted in printing.]

34 In United States Circuit Court of Appeals for the Third Circuit

No. 4994. October term, 1932

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, APPELLANT

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY, APPELLEES

Upon appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed February 6, 1933

Before Buffington, Davis, and Thompson, Circuit Judges

Per curiam.

Suit was brought in the court below to recover from the Philadelphia Barge Company and its surety upon a bond given to secure payment of taxes. The facts are sufficiently set forth in the opinion of the court below. MacLaughlin v. Philadelphia Barge Co., 60 F. (2d) 333.

35 The court having adjudged the affidavit of defense sufficient, the United States attorney, on behalf of the collector of internal revenue, caused judgment to be entered for the defendants. This appeal is from that judgment.

We find no error in the conclusion of the court below that the suit had abated by reason of failure to substitute the respective successive collectors from time to time in accordance with the provisions of the act of February 8, 1899, as amended. 28 U.S.C.A., sec. 780.

Judgment affirmed.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

36 In United States Circuit Court of Appeals for the Third Circuit

No. 4994. October term, 1932

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY, APPELLEES

Judgment

Filed February 6, 1933

On appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, February 6, 1933.

J. W. THOMPSON,
Circuit Judge.

[File endorsement omitted.]

37 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Appellant's petition for rehearing

Now comes the appellant, Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, plaintiff below, by his attorney Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, and files this his petition for rehearing, and for his reasons therefor says:

1. In passing upon the question, to wit, the applicability of the act of February 8, 1899, as amended, and if so, whether the abatement provided therein goes to the writ only or to the cause of action, it being one founded on contract, the court failed to consider "whether the abatement provided therein goes to the writ only or to the cause of action", which is a really vital issue of the instant case.

38 2. In passing upon the question as aforesaid, the court failed to take into consideration the actual status of the appellant herein with respect to the time he was substituted as plaintiff for his deceased predecessor in office, Joseph S. MacLaughlin, who was the only other plaintiff collector in the instant case.

3. In passing upon the question as aforesaid, the court failed to take into consideration that the instant case is one founded on contract, and as such is differentiated from other cases held to have abated by virtue of the aforesaid act of Congress, as amended.

4. That the opinion does not conclude the litigation in the instant case and does not show a course of procedure for future guidance.

The plaintiff-appellant therefore respectfully submits to the court that in consideration of the foregoing, this his application for a rehearing should be granted.

Respectfully submitted.

EDWARD W. WELLS,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

I hereby certify that the foregoing petition for rehearing has been prepared at the request of Albert H. Ladner, Jr., collector of internal revenue, appellant; that I believe the petition to be meritorious; that the same is filed in good faith and is not interposed for the purposes of delay.

EDWARD W. WELLS,
United States Attorney.

39 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order denying rehearing

Filed March 11, 1933

And now, to wit: March 11, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

[File endorsement omitted.]

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In United States District Court for the Eastern District of Pennsylvania

[Title omitted.]

Petition

Filed June 1, 1933

Petition of Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, by Edward W. Wells, United States attorney in and for the eastern district of Pennsylvania, respectfully shows:

1. That Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, plaintiff herein, died while the case was under consideration by the trial judge.

2. That on July 20, 1932, the suggestion of death of Joseph S. MacLaughlin was noted on the record and Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, present plaintiff, was substituted for the aforesaid Joseph S. MacLaughlin.

3. That on July 26, 1932, judgment was inadvertently entered against Joseph S. MacLaughlin instead of against Albert H. Ladner, Jr., thru a clerical error.

4. That on March 11, 1933, the Circuit Court of Appeals, Third Circuit, affirmed the opinion of the lower court and returned
42 its mandate to the District Court on May 29, 1931.

That it was only upon preparing the record for certiorari to the United States Supreme Court that the formal defect in the entry of the judgment was noted.

6. Wherefore, it is respectfully requested that the formal defect in the entry of the aforesaid judgment as against Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, be corrected nunc pro tunc and that the judgment be ordered to read as against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania.

And he will ever pray, etc.

/s/ EDWARD W. WELLS,
United States Attorney.

43 [Duly sworn to by Edward W. Wells, jurat omitted in printing.]

44 In United States District Court

[Title omitted.]

Order correcting judgment

Filed June 2, 1933

And now, to wit: this 2d day of June 1933, on hearing and consideration of the within petition, it is ordered that same be granted and that the judgment entered in the within case against Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, be and hereby is, corrected to read against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, nunc pro tunc.

By the court:

/s/ W. H. KIRKPATRICK, *J.*

45 In United States District Court

Stipulation as to amended judgment

Filed June 6, 1933

Whereas the above case was argued in the Circuit Court of Appeals, Third Circuit, and the District Court's opinion affirmed, and the mandate of the Circuit Court was returned to the District Court;

Whereas the plaintiff intends to file a petition for writ of certiorari to the United States Supreme Court;

Whereas the record did show a clerical error in the entry of the judgment against Joseph S. MacLaughlin, former collector of internal revenue, first collection district of Pennsylvania, now deceased;

Whereas the trial judge, upon consideration and hearing of a petition by the plaintiff, did correct a formal defect in the entry of judgment, nun pro tunc, to be as against Albert H. Ladner, Jr., collector of internal revenue for the first collection district of Pennsylvania, instead of against the aforesaid Joseph S. MacLaughlin, collector of internal revenue for the first collection district of Pennsylvania, now deceased:

It is hereby stipulated and agreed by and between counsel
46 for the plaintiff and counsel for the defendant that the amended judgment may be incorporated into the record to be filed in the Supreme Court with the petition for writ of certiorari.

/s/ EDWARD W. WELLS,
United States Attorney.

/s/ SAUL, EWING, REMICK & SAUL,
Attorneys for Defendant.

47 [Clerk's certificate to foregoing papers omitted in printing.]

48 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 37,756. U.S. Circuit Court of Appeals, Third Circuit. Term No. 153. Alvin F. Fix, Collector of Internal Revenue for the First Collection District of Pennsylvania, Petitioner, vs. Philadelphia Barge Company and National Surety Company. Petition for a writ of certiorari and exhibit thereto. Filed June 9, 1933. File No. 153 O. T. 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

ALBERT H. LADNER, JR., COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Pennsylvania (R. 22) is reported in 60 F. (2d) 333. The opinion of the Circuit Court of Appeals (R. 33) is reported in 63 F. (2d) 258.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 6, 1933 (R. 34), and a petition for rehearing denied on March 11, 1933 (R. 36). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the failure to substitute a Government officer as party plaintiff in a suit on a bond for the benefit of the United States within the six months' period prescribed by Section 11 of the Act of February 13, 1925 (*infra*, p. 9), abate not only the immediate suit but also preclude a new suit on the bond by a successor in office?

STATUTE INVOLVED

Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, is printed in the Appendix, p. 9, *infra*.

STATEMENT

On March 18, 1931, James S. MacLaughlin, Collector of Internal Revenue for the First Collection District of Pennsylvania, brought suit in the District Court of the United States for the Eastern District of Pennsylvania against the Philadelphia Barge Company and the National Surety Company to recover the sum of $12,635, with interest and costs (R. 3–8). The suit was founded upon a bond dated February 17, 1921, whereby the Barge Com-

pany, as principal, and the Surety Company, as surety, obligated themselves to Ephraim Lederer, Collector of Internal Revenue, "or his Successors", for the payment of so much of the amount claimed of the income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue (R. 6–7). It was alleged by the plaintiff that he was one of Lederer's successors in office and as such brought the suit upon the bond (R. 5).

Respondents filed an affidavit of defense in which was incorporated, *inter alia,* a plea that the cause of action had "been lost" by failure to comply with the provisions of Section 11 of the Act of February 13, 1925, *infra,* p. 9 (R. 11–19). This plea recited (R. 18) that in August, 1926, one Blakely D. McCaughn, a former Collector, had sued upon the same bond; that judgment was awarded McCaughn for want of sufficient affidavit of defense; that McCaughn resigned as Collector on December 31, 1927; that on December 13, 1930, a suggestion was filed in that case by the defendants (respondents herein) that the cause of action had abated under the provisions of Section 11 of the Act of 1925, because no substitution had been made of McCaughn's successor as party plaintiff within the six months' period prescribed by that Act; and that on December 22, 1930, the court entered an order striking the judgment from the record upon the

ground that the action had abated prior to the entry of the judgment (R. 18).

Upon a motion for judgment for want of a sufficient affidavit of defense (R. 19–21), the District Court sustained the plea in abatement contained in such affidavit and entered judgment for the respondents herein * (R. 22–24, 25). Although the District Court said that it assumed that MacLaughlin would have been the proper party to sue on the bond if no prior suit had been brought by McCaughn, it held that because there had been such a suit the failure of the Government to cause substitution to be made, after the plaintiff had left office, of his successor or successors, in compliance

* Prior to the entry of judgment in the District Court, the United States Attorney filed a suggestion of the death of MacLaughlin and requested the substitution of Albert H. Ladner, present Collector of Internal Revenue, as party plaintiff (R. 24–25). While no formal order of substitution appears in the record, an exception to the judgment was taken on behalf of Ladner (R. 26), the appeal to the Circuit Court of Appeals was applied for in his name (R. 27, 30), and his name appears as the party appellant in all of the proceedings in that court (R. 33 et seq.). The record does not show the date of MacLaughlin's death, but we are advised by the Bureau of Internal Revenue that he died on June 11, 1932. As the suggestion of death was filed on July 20, 1932 (pp. 24–25), it was within the six months' period prescribed by the Act of 1925. The United States Attorney advises that "the substitution of Ladner as plaintiff in lieu of Joseph S. MacLaughlin, upon the death of the latter, is strictly in accord with the Pennsylvania practice, and an order of the Court for the same is not necessary. The attorney for the deceased party merely files the suggestion on the record and notifies the other party."

with the Act of 1925, resulted not only in the abatement of that suit but also of the Government's cause of action upon the bond. The court said that if this was not so "the abatement could be avoided and the Act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector," and that "In addition there is no injustice in refusing to permit parties to be harrassed by the necessity of defending more than one suit for the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought" (R. 23–24). Upon appeal the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision (R. 33).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In sustaining the judgment of the District Court that the affidavit of defense was sufficient because the cause of action had abated.

2. In holding that the cause of action had abated by reason of failure to substitute the respective successive Collectors from time to time in accordance with the provisions of the Act of February 13, 1925.

REASONS FOR GRANTING THE WRIT

We submit that the courts below have misconstrued Section 11 of the Act of 1925. As indicated in the cases referred to by this Court in its recent

decision in *Ex parte La Prade,* No. 21, Original, October Term, 1932, decided May 22, 1933, the sole purpose of that legislation was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. (See also House Report 960, 55th Cong., 2d Sess., p. 2.) It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of that legislation which does away with the right to bring a new suit, under appropriate circumstances, if the procedure outlined by the statute is not followed. Thus, where the successor of an officer who was the defendant in a case which has abated continues the alleged illegal official conduct which was charged against his predecessor, the right of the plaintiff to bring a new suit against the successor has never been doubted. (*United States ex rel. Claussen* v. *Curran,* 276 U.S. 590, cf. *United States ex rel. Claussen* v. *Day,* 279 U.S. 398; *Matheus, U.S. Marshal* v. *United States ex rel. Cunningham,* 282 U.S. 802, *cf. Fetters, U.S. Marshal* v. *United States ex rel. Cunningham,* 283 U.S. 638. See also *United States ex rel. Bernardin* v. *Butterworth,* 169 U.S. 600, 605, cf. *United States* v. *Duell,* 172 U.S. 576.)

If the failure to substitute in such a case does not preclude the bringing of a new suit, we are unable

to see why it should do so in a case like the instant one. The bond in this case ran to "Ephriam Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 9). As was said by the Circuit Court of Appeals for the Second Circuit in *Bowers* v. *American Surety Company,* 30 F. (2d) 244, 246 (certiorari denied, 279 U.S. 865), "the purpose of such bonds is to create an obligation in behalf of the incumbents, as they succeed each other." By the terms of the bond and *virtute officii* the right to sue upon this bond devolved upon McCaughn's successor in office, MacLaughlin. By its admission that if McCaughn had not first brought suit, MacLaughlin's suit would have been good, the District Court correctly recognized that the right of action upon the bond survived McCaughn's resignation from office. But it then proceeds, illogically we submit, to decide that the failure to substitute MacLaughlin in McCaughn's suit not only destroyed that suit but also the cause of action upon the bond which it had previously recognized as surviving the passing of McCaughn from office. The statute is purely procedural and was clearly not meant to affect the rights and obligations of public officers if, as a matter of substantive law, they continue to exist after a suit by or against a former officer has abated. So to construe the statute is to extend it far beyond its obvious purpose.

Furthermore, the construction placed upon Section 11 of the Act of 1925 by the courts below has

the effect of imposing a time limitation upon the enforcement of rights accruing under bonds given to public officers to insure the collection of the revenue of six months after a change in office *pendente lite*—a result which Congress could hardly have intended.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX

Statute Involved

Act of February 13, 1925, c. 229, 43 Stat. 936, 941, (U.S.C., Title 28, Sec. 780):

Sec. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL Surety Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Pennsylvania (R. 12) is reported in 60 F. (2d) 333. The opinion of the Circuit Court of Appeals (R. 19) is reported in 63 F. (2d) 258.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 6, 1933 (R. 19), and a petition for rehearing denied March 11, 1933 (R. 21). A

petition for a writ of certiorari was filed June 10, 1933, and granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the failure to substitute a Government officer as party plaintiff in a suit on a bond for the benefit of the United States within the six months' period prescribed by Section 11 of the Act of February 13, 1925, *infra*, p. 17, abate not only the immediate suit but also preclude a suit on the bond by a successor in office?

STATUTE INVOLVED

Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, is printed in the Appendix, *infra*, p. 17.

STATEMENT

On March 18, 1931, James S. MacLaughlin, Collector of Internal Revenue for the First Collection District of Pennsylvania, brought suit in the District Court of the United States for the Eastern District of Pennsylvania against the Philadelphia Barge Company and the National Surety Company to recover the sum of $12,635, with interest and costs (R. 2–5). The suit was founded upon a bond dated February 17, 1921, whereby the Barge Company, as principal, and the Surety Company, as surety, obligated themselves to Ephraim Lederer, Collector of Internal Revenue, "or his Successors," for the payment of so much of the amount claimed of the

income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue (R. 4, 5-6). It was alleged by the plaintiff that he was one of Lederer's successors in office and as such brought the suit upon the bond (R. 3).

Respondents filed an affidavit of defense (R. 6–11) in which was incorporated, *inter alia*, a plea that the cause of action had "been lost" by failure to comply with the provisions of Section 11 of the Act of February 13, 1925, *infra*, p. 17. (R. 10.) This plea recited (R. 10) that in August 1926 one Blakely D. McCaughn, a former Collector, had sued upon the same bond; that judgment was awarded McCaughn for want of a sufficient affidavit of defense; that McCaughn resigned as Collector on December 31, 1927; that on December 13, 1930, a suggestion was filed in that case by the defendants (respondents herein) that the cause of action had abated under the provisions of Section 11 of the Act of 1925, because no substitution had been made of McCaughn's successor as party plaintiff within the six months' period prescribed by that Act; and that on December 22, 1930, the court entered an order striking the judgment from the record upon the ground that the action had abated prior to the entry of the judgment.

Upon a motion for judgment for want of a sufficient affidavit of defense (R. 11–12), the District Court sustained the plea in abatement contained in such affidavit and entered judgment for the respond-

ents herein [1] (R. 12–14). Although the District Court said that it assumed that MacLaughlin would have been the proper party to sue on the bond if no prior suit had been brought by McCaughn, it held that because there had been such a suit the failure of the Government to cause substitution to be made, after the plaintiff had left office, of his successor or successors, in compliance with the Act of 1925, resulted not only in the abatement of that suit but also of the Government's cause of action upon the bond. The court said that if this was not so "the abatement could be avoided and the Act of 1925 rendered practically inoperative by simply beginning a new suit in the name of the subsequent collector," and that "In addition there is no injustice in refusing

[1] Prior to the entry of judgment in the District Court, the United States Attorney filed a suggestion of the death of MacLaughlin and requested the substitution of Albert H. Ladner, then Collector of Internal Revenue, as party plaintiff (R. 14). While no formal order of substitution appears in the record, an exception to the judgment was taken on behalf of Ladner (R. 15), the appeal to the Circuit Court of Appeals was applied for in his name (R. 17), and his name appears as the party appellant in all of the proceedings in that court (R. 18, *et seq.*). It furthermore appears that on June 2, 1933, the District Court entered an order *nunc pro tunc* correcting its judgment, which was entered after the death of MacLaughlin, so as to make it run against Ladner and not MacLaughlin (R. 22). This order has been incorporated in the record pursuant to a stipulation of counsel (R. 22). The record does not show the date of MacLaughlin's death, but we are advised by the Bureau of Internal Revenue that he died on June 11, 1932. As the suggestion of death was filed on July 20, 1932 (R. 14), it was within the six months' period prescribed by the Act of 1925. The United States Attorney at Philadelphia advises

to permit parties to be harassed by the necessity of defending more than one suit for the same cause of action when a very simple procedure is offered for the continuance to a conclusion of the action as originally brought" (R. 13 14). Upon appeal the judgment of the District Court was affirmed by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision (R. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred —

1. In sustaining the judgment of the District Court that the affidavit of defense was sufficient because the cause of action had abated.

2. In holding that the cause of action had abated by reason of failure to substitute from time to time, in accordance with the provisions of the Act of February 13, 1925, the respective successors of the Collector bringing the original suit on the bond.

SUMMARY OF ARGUMENT

The courts below have misconstrued Section 11 (a) of the Act of February 13, 1925, *infra*, p. 17. The

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that "the substitution of Ladner as plaintiff in lieu of Joseph S. MacLaughlin, upon the death of the latter, is strictly in accord with the Pennsylvania practice, and an order of the Court for the same is not necessary. The attorney for the deceased party merely files the suggestion on the record and notifies the other party." On October 16, 1933, the Solicitor General filed with this Court a suggestion of the resignation of said Albert H. Ladner, Jr., as Collector of Internal Revenue for the First Collection District of Pennsylvania and requested the substitution of Alvin F. Fix, present Collector, as party petitioner, which motion was granted on October 16, 1933.

sole purpose of that legislation was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of that legislation which does away with the right to bring a new suit, where the cause of action survives, merely because the procedure outlined by the statute is not followed.

The bond in this case was to Lederer, Collector, "or his successors." By the terms of the bond and *virtute officii* the right to sue upon this bond devolved upon the succeeding collectors in office. The decisions recognize that the right of action on a bond survives the passing of the original obligee from office. At common law the right of the incumbent to sue on the bond would continue to exist after a suit by a former collector had abated for want of proper parties. The statute was not meant to limit this right in any way. It was purely procedural and should not be extended beyond its obvious purpose.

Moreover, the construction adopted by the courts below has the effect of imposing a time limitation upon the enforcement of the bond—a result hardly intended by Congress.

ARGUMENT

This suit is against the principal and surety upon a bond given to secure the payment of Federal in-

come taxes. The bond was on February 17, 1921, delivered to Lederer, the then Collector, and named as obligee "Ephraim Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 5). Lederer resigned as Collector July 31, 1921, and was succeeded by McCaughn. On August 6, 1926, McCaughn, then in office, brought an earlier suit upon this same bond. During the pendency of that suit, McCaughn went out of office December 31, 1927. He was succeeded by Brown, who acted until May 31, 1928, when he, in turn, was succeeded by MacLaughlin. No substitution of the succeeding Collectors as provided by Section 11 (a) of the Act of February 13, 1925 (*infra*, p. 17), was made within six months after the expiration of McCaughn's term (R. 13). Because of this failure to substitute, this earlier suit was abated (R. 13); whereupon this present suit was instituted by MacLaughlin, the then Collector.[2] The only question in this case is whether the failure to substitute Collectors in the earlier suit abated the cause of action as well as the writ in that case, thus precluding a second suit on the bond. It is the Government's position that the courts below misconstrued the Act of 1925 in holding that a new suit on the bond could not be brought.

Section 11 (a) of that Act, *infra*, p. 17, so far as pertinent, provides:

> That where, during the pendency of an action, suit, or other proceeding brought by

[2] With reference to the substitution in the present suit of MacLaughlin's successors in office, see footnote 1, *sup. a*, pp. 4–5.

> or against an officer of the United States * * * and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, *it shall be competent* for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, *to permit the cause to be continued* and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for *so continuing* and maintaining *the cause* and obtaining an adjudication of the questions involved. (Italics ours.)

The precursor to this section was the Act of February 8, 1899, c. 121, 30 Stat. 822 (U.S.C., Title 28, Sec. 780).[3] The Act of 1899 was inspired by judicial decision and suggestion. This Court in a number of cases had held that a writ of mandamus issued against

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[3] The Act of February 8, 1899, read in part as follows:

"That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

the head of a Government Department was personal in its nature and not directed against the office and that the action abated upon the death, resignation, or removal of the individual. Thus a mandamus proceeding brought against the head of a Government Department might proceed as far as this Court and yet, because of its nature, would abate upon his death or resignation and the question of law involved could not be settled without first instituting a new suit against the successor in office. See *Secretary* v. *McGarrahan*, 9 Wall. 298 (Mandamus against the Secretary of the Interior); *United States* v. *Boutwell*, 17 Wall. 604 (Mandamus against the Secretary of the Treasury); *United States* v. *Chandler*, 122 U.S. 643 (Mandamus against the Secretary of the Navy); *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28 (Injunction against the Secretary of the Interior and Commissioner of the General Land Office); *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600 (Mandamus against the Commissioner of Patents).

In the *Butterworth* case, *supra*, decided March 21, 1898, the Court made this suggestion (p. 605):

> In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method.

It was in response to this suggestion that Congress passed the Act of 1899.[4] See *Murphy* v. *Utter*, 186 U.S. 95, 101; *Caledonian Coal Co.* v. *Baker*, 196 U.S. 432, 440–442; *Irwin* v. *Wright*, 258 U.S. 219, 222; *Ex parte La Prade*, 289 U.S. 444. See also H.Rep. No. 960, 55th Cong., 2d Sess. During the debate in the House upon the bill (Cong. Record, Vol. 31, Part 4, pp. 3865–3866), Mr. Connolly, from the Committee on the Judiciary, referring to the *Butterworth* case, *supra*, explained the purpose of the bill as follows (p. 3866):

> Some individual has been for years trying to get action by that Bureau [referring to the Office of the Commissioner of Patents] different from the action that Commissioner Seymour took in refusing him certain rights that he claimed. Seymour went out of office while the action was pending, and the suit abated. Butterworth was appointed, and the suit was resumed against Butterworth. It ran along against him through the various courts until it came to the Supreme Court, and during

[4] The Act of 1899 applied only to proceedings by or against officers of the United States and did not affect State officials. In *Irwin* v. *Wright*, 258 U.S. 219, this Court suggested that it would promote justice if Congress were to enlarge the scope of that Act so as to authorize substitution in suits by or against State officers. It was pursuant to this suggestion that the Act of 1899 was enlarged by the Act of February 13, 1925, here involved, and subdivision (b) of the latter Act, *infra*, p. 17, was inserted, making provision for substitution in proceedings brought by or against those holding office under State authority. See *Ex parte La Prade*, 289 U.S. 444, 457.

> its pendency he died and the suit again abated. Now the plaintiff is compelled to go back and commence against Commissioner Duell, the new Commissioner of Patents, without any assurance that Duell will live or remain in office long enough for the plaintiff to obtain a decision from the Supreme Court of the United States. The purpose of the bill is that the suit may survive if the defendant dies.

Thus, it is entirely clear that the sole purpose of the statute was to obviate the inconvenience and delay which resulted from the abatement of suits involving public officers because of the death or resignation of such officers or their separation from the service. It accordingly provided a procedure which, if followed, would eliminate the necessity of a new suit. But there is nothing in either the history or the wording of the statute which does away with the right to bring a new suit, where the cause of action survives, merely because the procedure outlined by the statute is not followed. The statute was designed solely to remove a common-law impediment to the continuance of certain suits. As stated in *Roberts* v. *Lowe*, 236 Fed. 604, 605 (S.D. N.Y.):

> This *remedial* act was to enable pending proceedings against public officials in their official capacity to be continued when necessary to obtain settlement of the questions involved. * * *

The Act was obviously intended as a liberalizing measure, and it would be entirely foreign to its pur-

pose to suppose that it was intended to take away any rights which had obtained at common law.

Moreover, the statute is not mandatory but merely permissive. *Brown-Crummer Inv. Co.* v. *City of Florala, Ala.*, 55 F. (2d) 238, 243 (M.D. Ala.). As this Court said in *Ex parte La Prade, supra* (p. 458):

> The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered. * * *

To construe this purely permissive, remedial statute as abolishing substantive causes of action, unless its terms are complied with, is to extend it far beyond its obvious purpose.

The bond in this case ran to "Ephraim Lederer, Collector, First District, Pennsylvania, or his Successors" (R. 9). The giving of the bond clearly gave rise to a cause of action separate and distinct from the right to collect taxes. Cf. *United States* v. *John Barth Co.*, 279 U.S. 370. This cause of action did not abate upon the death, resignation, or removal from office of the original obligee named in the bond. As was said by the Circuit Court of Appeals for the Second Circuit in *Bowers* v. *American Surety Co.*, 30 F. (2d) 244, 246 (certiorari denied, 279 U.S. 865):

> * * * the purpose of such bonds is to create an obligation in favor of the incumbents, as they succeed each other; * * *.

Aside from the fact that the bond in terms ran to the successors in office, it was, in its nature, an ordinary form of debt obligation. As such it was not destroyed by the death of the original obligee nor his separation

from office. Being given for an official purpose and having the attributes of transferability, all rights under this obligation passed to each successor in office of the original obligee as he assumed the office. Therefore, because of the nature of the obligation and by reason of its very terms and by virtue of their office, the right to sue upon the bond devolved upon Lederer's successors. See *McCaughn* v. *Union Paving Co.*, 60 F. (2d) 657 (E.D. Pa.), affirmed, 63 F. (2d) 258 (C.C.A. 3d); cf. *Webber* v. *St. Paul City Ry. Co.*, 97 Fed. 140, 145 (C.C.A. 8th).

The District Court admitted that (R. 23)—

> McCaughn was the proper plaintiff in the former suit, and, if no prior suit had been brought it may be assumed that MacLaughlin, the present collector, would be the proper party to sue, in spite of the fact that he is not the obligee in the bond.

The court thus correctly recognized that the right of action on the bond survived Lederer's (the original obligee) resignation from office. But while thus recognizing that the cause of action survived to each of Lederer's successors, the court is illogical, we submit, in deciding that the failure to substitute MacLaughlin in McCaughn's suit not only destroyed the suit but also the cause of action on the bond.

We think the former suit by McCaughn was properly abated since no substitution was made within six months after the expiration of his term as provided by the statute. This was proper under the general rule at common law that the termina-

tion or transfer *pendente lite* of the interest of the plaintiff in the subject matter of the suit abates it. But this abatement of the suit for failure to substitute as provided by statute, while a complete termination of that particular suit, does not defeat the cause of action or bar the issuance of a new writ or the institution of a new suit. *St. Romes* v. *Cotton Press Co.*, 127 U.S. 614, 619; *Marvin* v. *Baltimore & Ohio Railroad*, 151 U.S. 673, 703; *Macker* v. *Thomas*, 7 Wheat. 529, 532; *Green* v. *Watkins*, 6 Wheat. 260; *Elliott* v. *Teal*, Fed. Cas. No. 4,389 (Ore.); *Warren* v. *Furstenheim*, 35 Fed. 691, 693 (W.D. Tenn.); *Harrison* v. *Fire Insurance Co.*, 102 Iowa 112, 115; *Pitts Sons' Manf. Co.* v. *Commercial Nat. Bank*, 121 Ill. 582, 586 587. Whether the cause of action survives is a question of right and not of *procedure*, depending upon the substance of the cause of action. *Schreiber* v. *Sharpless*, 110 U.S. 76, 80; *Sanders' Adm'x* v. *Louisville & N. R. Co.*, 111 Fed. 708, 710 (C.C.A. 6th); *Martin* v. *Wabash R. Co.*, 142 Fed. 650, 651 (C.C.A. 7th). If, as we contend, the cause of action survived the passing from office of the Collector to whom the bond was given, we submit that it would be contrary to the manifest purpose of the statute here involved to hold that noncompliance with its terms had the effect of destroying not only the pending proceeding, but also the cause of action. This statute did not purport to deal with substantive rights; it merely provided a procedure whereby under certain circumstances suits which otherwise would have abated might be con-

tinued in order to obtain a settlement of the question involved. It was not designed to affect the rights and obligations of public officers or to take away causes of action where as a matter of substantive law they continued to exist after a suit by or against a former officer has abated. The common law right to bring this second suit may not be taken away by mere implication. *Continental Secur. Co.* v. *Interborough R. T. Co.*, 193 N.Y.S. 892, 896.

Furthermore, the construction placed upon the statute by the courts below has the effect of imposing a time limitation upon the enforcement of rights accruing under bonds given to public officers to insure the collection of the revenue of six months after a change in office *pendente lite* — a result which Congress could hardly have intended. Cf. *United States* v. *John Barth Co.*, *supra*.

In *habeas corpus* proceedings instituted against a Commissioner of Immigration or a United States Marshal which have abated for want of timely substitution, the right to bring a new suit against the successor in office has never been doubted. *United States ex rel. Claussen* v. *Curran*, 276 U.S. 590; cf. *United States ex rel. Claussen* v. *Day*, 279 U. S. 398; *Mathues* v. *United States ex rel. Cunningham*, 282 U.S. 802; cf. *Fetters* v. *United States ex rel. Cunningham*, 283 U.S. 638. If the failure to substitute in such a case does not preclude the bringing of a new suit, we are unable to see why it should do so in a case like the instant one. In the cases cited the new suit was undoubtedly based upon a continuing of the

alleged illegal official conduct by the successor in office, which gave rise to a cause of action against such incumbent. In this case the bond in terms created a continuing obligation running to the successor in office, which gave to such successor a right of action on the bond.

We submit the court below clearly erred in holding that the abatement of the earlier suit destroyed the cause of action.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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SEWALL KEY,
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W. MARVIN SMITH,
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NOVEMBER 1933.

APPENDIX

STATUTE INVOLVED

Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U.S.C., Title 28, Sec. 780):

SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 153

ALVIN F. FIX, COLLECTOR OF INTERNAL REVENUE for the First Collection District of Pennsylvania, petitioner

v.

PHILADELPHIA BARGE COMPANY AND NATIONAL Surety Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondent's brief has raised several new issues.

1. Respondent argues (Br., pp. 1–3) that the Circuit Court of Appeals had no jurisdiction in this case for the reason that the appeal by the Collector was not taken from a final decision of the District Court. Reliance is placed on *Shumaker* v. *Life Insurance Co.*, 159 Fed. 112 (C.C.A. 3d).

That case has no application here. It merely holds that the appellate jurisdiction of the Circuit Court of Appeals is limited by Section 128 (a) of

the Judicial Code (U.S.C., Title 28, Sec. 225) to a review of final decisions, and since the appeal there was from an interlocutory order discharging a rule for judgment, which was not a final decision, the court had no jurisdiction. Here the appeal was taken not from an interlocutory order but from a final judgment. (R. 17.)

The affidavit of defense filed in this case raised a single question of law, namely, that failure to timely substitute succeeding Collectors abated not only the prior pending suit but destroyed the cause of action as well. As stated by the District Court (R. 12):

> The only question raised by this affidavit of defense is whether the cause of action is abated, the affidavit of defense being the statutory equivalent of a plea in abatement.

The court ruled in defendant's favor, holding that the cause of action had abated. This disposed of the whole of the Collector's claim and ended the case so far as any further proceedings by the Collector in the District Court were concerned. Accordingly, unlike the *Shumaker case, supra,* where the District Court merely ordered that "The rule for judgment is therefore discharged" (see opinion District Court, 153 Fed. 332, 355), the court entered final judgment for the defendant. (R. 14.) The judgment was clearly reviewable by the Circuit Court of Appeals under Section 128 (a) of the Judicial Code, *supra.* Cf. *Riling* v. *Idell,* 291 Pa. 472, 476.

2. Respondent argues (Br. pp. 3–4) that the appeal to the Circuit Court of Appeals in this case was from a consent judgment and that under the rule of *United States* v. *Babbitt*, 104 U.S. 767, no appeal lies from such a judgment. But the appeal in this case was not taken from a consent judgment but from the considered judgment of the District Court. In the *Babbitt case, supra*, the lower court in an elaborate opinion had held that the claimant there could not recover, yet after this decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney General, in favor of the claimant. Here the United States Attorney's praecipe for judgment (R. 14) was merely a request for judgment pursuant to and "in accordance with the opinion" previously filed. There was no waiver of errors. It was proper under the circumstances to request the entry of final judgment, since the court's opinion disposed of the whole of the Collector's case and left no room for further proceedings by the Government in the District Court.

The United States Attorney advises that the respondent urged both of the above jurisdictional points upon the Circuit Court of Appeals; but the court took no cognizance of either one, assumed jurisdiction, and decided in the respondent's favor on the merits.

3. Respondent argues (Br. pp. 5–9) that the present petitioner has no standing in this case because the respondent was not notified of the substi-

tution of Ladner for MacLaughlin in the District Court, or of the substitution of Fix for Ladner in this Court, and was not given an opportunity to present an objection. What this objection could have been is not apparent. Respondent relies on Section 11 (c) of the Act of February 13, 1925, which provides (U.S.C., Title 28, Sec. 780):

> (c) Before a substitution under this section is made, *the party or officer to be affected*, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have. (Italics ours.)

This provision appeared for the first time in the 1925 amendment to the original Act of 1899. It merely provided for consent of the succeeding officer, who would be affected by the substitution. The words "party or officer to be affected" refer to the incumbent in office, not to the adverse party to the proceedings. This is apparent from the hearings before the subcommittee of the Senate Committee on the Judiciary (U.S. Senate, 68th Congress, Second Session, S. 2060, No. 84446), where the purpose of the 1925 amendment was explained as follows (p. 16):

> Paragraph (c) adds a new feature by requiring that notice of the application for such substitution and an opportunity to be heard in objection thereto shall be given *the incumbent of the office,* unless he has ex-

> pressly consented to the substitution. (Italics ours.)

This is also shown from the House Report on the amendment (House Report 1075, 68th Congress, Second Session, page 7), in which it was stated—

> Under this provision, the new State, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice.

That the statute requires only the consent of the incumbent in office was recognized by this Court in *Ex parte LaPrade*, 289 U.S. 444, where it was said (pp. 454, 458):

> The section requires that the officer, unless expressly consenting thereto, be given reasonable notice of the application and an opportunity to present any objection which he may have (p. 454).
>
> * * * * *
>
> Subdivision (c) extends to all cases covered by (a) and (b). It merely requires that before substitution a nonconsenting officer shall be given notice and opportunity to object (p. 458).

Thus it seems clear that notice to the respondent herein was not a prerequisite to a substitution under the statute.

The suggestion in respondent's brief, page 6, that the District Court did not even pass upon the first substitution is clearly erroneous. (See footnote 1, page 4 of our original brief.) The appeal was taken in the name of Ladner (R. 17), and the

proceedings were conducted in his name in the Circuit Court of Appeals. (R. 18 19.) Later the judgment of the District Court was amended so as to run against him and the amended judgment was incorporated in the record pursuant to stipulation of counsel. (R. 21 23.)

Moreover, as shown from the letter of the United States Attorney, appearing in the Appendix hereto, counsel for respondent was specifically notified of the suggestion of the death of MacLaughlin and the request for substitution of Ladner as plaintiff. In spite of this notice received on July 19, 1932, respondent made no objection to the petition for appeal filed September 14, 1932 (R. 17), but, on the other hand, by stipulation filed June 6, 1933, consented to incorporation of the amended judgment in the transcript of record. Had respondent any objections to the substitution, it seems altogether clear that his subsequent actions constituted a waiver thereof.

4. Under his point III the respondent makes the statement (Br. p. 9) that—

> The petitioner argues from this that the sole purpose of the Abatement Act was to permit the continuance of mandamus and habeas corpus proceedings, which by their nature must be suits *against* public officials.

This is not our position. While the Act of 1899 was undoubtedly inspired by the opinion of this Court in *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600, which was a mandamus pro-

ceeding, nevertheless the scope of the Act, certainly of the 1925 amendment, was extended to include any "action, suit, or other proceeding brought by or against an officer of the United States." The hearings before the Subcommittee of the Committee on the Judiciary on the 1925 amendment show that the scope of the Act was enlarged to cover all cases of this kind. There it was said (p. 16)

> The provision for substitution applies only to suits relating to the present or future discharge by the officer in his official duties. Such suits, unless falling within the limited class defined in the act of 1899, must in many instances be dismissed, sometimes after reaching the Supreme Court, because of the expiration of the term for which the officer was elected or appointed, or of his otherwise vacating the office. Where the officer's term is for one or even two years, it is practically impossible within that period for him or one suing him in his official capacity, to prosecute a suit involving the assertion of a Federal right to the exhaustion of appellate review. The Supreme Court is, in consequence, debarred from passing upon many important Federal claims which in other cases would come before it and be disposed of in ordinary course. Adequate relief against this inequitable situation will, it is believed, be afforded litigants in such cases by the provisions of this section. It will be noted, however, that the provision for sub-

> stitution is not mandatory, but leaves it to the sound discretion of the Court to determine whether there is a substantial need for continuing the cause and obtaining an adjudication of the questions involved.

It will be noted from the above quotation that the provision is not mandatory, and supports *Ex parte LaPrade*, 289 U.S. 444, and *Brown-Crummer Co.* v. *City of Florala*, 55 F. (2d) 238 (M.D. Ala.), to that effect. Since it is not a mandatory but a remedial provision, it is difficult to see how it can abolish a cause of action that would normally survive.

United States ex rel. Claussen v. *Curran*, 276 U.S. 590, *LeCrone* v. *McAdoo*, 253 U.S. 217, and *Kuttroff* v. *Sutherland*, 49 F. (2d) 944 (S.D.N.Y.), do not stand for the proposition that failure to substitute within time abolishes the cause of action. They merely hold that the instant suit is abated. Cf. *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, cited at p. 15 of our original brief. In that case a new petition for habeas corpus was filed and the case eventually reached this Court, the question involved being there decided on the merits.

Respondent does not seriously contend that the cause of action, being *ex contractu*, does not survive the death of the original obligee. *Bowers* v. *American Surety Co.*, 30 F. (2d) 244 (C.C.A. 2d), specifically holds that such action does survive to the succeeding collectors in office. In fact, the District

Court admitted that the cause of action survived, and the cases cited on p. 14 of our brief establish the general proposition that actions *ex contractu,* as distinguished from actions *ex delicto,* do survive, and that abatement of a former suit constitutes no bar to the bringing of a new action. The right to bring a new suit where the cause of action survives continues as a matter of right, and does not depend upon the Abatement Act here involved. *Benson* v. *Crain,* 91 Vt. 44, cited by respondent (Br. p. 15), is not to the contrary. There, as stated in the opinion, "The question for decision relates to the survival, or perhaps, more accurately speaking, to the revivability, of a suit that would abate at common law."

The six-months' time limit provided for in the Act was merely a time limitation upon the right to continue a present suit. It constituted no time limit on the right to bring a new suit where the cause of action survived, but in the words of the Act, "it shall be *competent* for the court wherein the action, suit, or proceeding is pending * * * to *permit* the cause to be continued and maintained by or against the successor in office", (italics ours); and in construing this language this Court in the *LaPrade case,* at page 458, said: "The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered." We submit that in the face of the

plain language of the Act and its meaning as declared by this Court, the respondent's contention that the Act is mandatory is utterly unfounded.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
SEWALL KEY,
J. P. JACKSON,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

NOVEMBER 1933.

APPENDIX

Our File No. 10870-2

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY,
EASTERN DISTRICT OF PENNSYLVANIA,
Philadelphia, November 14, 1933.

SOLICITOR GENERAL,
Washington, D.C.

Re *Alvin F. Fix* v. *Phila. Barge Company et al.*

SIR: Please be advised that on July 19, 1932, this office notified Thomas P. Mikell, of the firm of Saul, Ewing, Remick, and Saul, that we had filed suggestion of death of Joseph S. McLaughlin and request for substitution of Albert H. Ladner as plaintiff.

Respectfully,

CHARLES D. MCAVOY,
United States Attorney.

T.J.C.: M.R.
Mr. CURTIN.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

JUL 18 1933
CHARLES ELMORE CROPLEY
CLERK

No. 153.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

ALBERT H. LADNER, Jr., COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF PENNSYLVANIA, Petitioner,

v.

PHILADELPHIA BARGE COMPANY and NATIONAL SURETY COMPANY.

RESPONDENTS' BRIEF UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WALTER BIDDLE SAUL,
Attorney for Respondents.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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No. 153.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

Albert H. Ladner, Jr., Collector of Internal Revenue for the First Collection District of Pennsylvania, Petitioner,

v.

Philadelphia Barge Company and National Surety Company.

RESPONDENTS' BRIEF UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF QUESTION PRESENTED.

In addition to the question presented by the petitioner there is a further question: Does the failure to show to the court a substantial need for continuing and maintaining the cause in the name of the present collector within six months of the death of the original plaintiff in the present suit abate the present suit?

ARGUMENT.

I. THE PRESENT SUIT HAS ABATED FOR FAILURE TO COMPLY WITH THE ACT OF 1925 WHETHER OR NOT THERE WAS ANY CAUSE OF ACTION AFTER THE ABATEMENT OF THE FIRST SUIT.

In addition to the requirements of the Act of February 13, 1925, c. 229, printed as the appendix to the petition, Rule 19, paragraph 4, of the rules of this court provides as follows:

> "4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

The petitioner has failed to comply with the terms of the act and this rule in that he has never at any stage of this case attempted to show to the District Court or to the Circuit Court of Appeals "that there is a substantial need for * * * continuing and maintaining the cause and obtaining an adjudication of the question involved."

After the abatement of the first suit the present suit was brought in the name of Joseph S. McLaughlin, who was a successor to the collector who brought the first suit. Joseph S. McLaughlin died on June 11, 1932, and instead of complying with the Act of 1925 and the above rule of court, a suggestion of the death of McLaughlin and the substitution of the plaintiff, as his successor, was filed in the District Court. Thereafter proceedings were taken in the name of Albert H. Ladner, the present collector, without any order of the District or Circuit Court.

It is true that the filing of the suggestion would be sufficient under Pennsylvania practice. The petitioner argues that the Conformity Act applies and that hence the suggestion of death and substitution is proper. But the Conformity Act is in force

only to the extent that the State practice does not conflict with other Acts of Congress.

As stated by Mr. Justice Gray in LUXTON v. BRIDGE CO., 147 U. S. 337, 338 (1892),

> "This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress. *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Chateaugay Co., petitioner*, 128 U. S. 544; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202."

In SOUTHERN PACIFIC R. R. v. DENTON, *supra*, the same Justice said,

> "And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. *Ex parte Fisk*, 113 U. S. 713, 721; *Whitford* v. *Clark County*, 119 U. S. 522."

The many other cases which are all to the same effect may be found in note 5 to Title 28, sec. 724 of U. S. Code Ann.

In view of the positive provisions of the abatement act and the mandatory rule of this court, it is submitted that the Pennsylvania State practice is of no moment. A petition for the substitution of Ladner as plaintiff should have been filed accompanied by such averments as would show to the court the necessity for continuing the cause. For failure to comply with the requirements, the action has now abated. (LECRONE v. MCADOO, 253 U. S. 217; UNITED STATES v. CURRAN, 276 U. S. 590.)

II. RIGHT TO SUE SUCCEEDING OFFICER FOR CONTINUANCE OF ILLEGAL ACT IS NO AUTHORITY FOR THE CONTINUANCE OF THIS CASE.

One of the questions argued before the District and Circuit Courts was whether the order of the District Court abating the first suit constituted an abatement of the cause of action or only the writ.

The petitioner argues that, where the successor of an officer who was the *defendant* in a case which has abated, continues the illegal official conduct charged against his predecessor, the right of the plaintiff to bring a suit against the successor has never been doubted (p. 6 of petition). This is unquestionably a correct statement of the law. But petitioner then argues that this rule is authority for the proposition that the failure to substitute a succeeding officer as *plaintiff* does not affect the right to bring a new suit.

An analysis of the reasons for the rule shows clearly its inapplicability to the present case. Where a succeeding officer continues illegal conduct previously charged against his predecessor, the basis of the right of action against him is the new tort or the threat of one. There is a new cause of action which is entirely independent of the cause against the former officer. It is for his own unauthorized illegal conduct that the second official is sued. But in the present case the second suit is upon the same cause of action as the first suit which abated. This cause of action was merged in the judgment that was entered in the first suit and when that judgment was stricken off, there was no longer a cause of action to support a second suit.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be refused.

WALTER BIDDLE SAUL,
Attorney for Respondents.

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I. THE APPEAL WAS NOT FROM A FINAL DECISION OF THE DISTRICT COURT.

This case was argued before the District Court upon a rule for judgment for want of a sufficient affidavit of defense (R. 11, 12). That Court in effect discharged the rule by holding that "The affidavit of defense is adjudged to be sufficient." (R. 14).

There was no other order of the District Court adverse to petitioner's predecessor, but the United States Attorney filed in the clerk's office a praecipe for judgment in favor of respondent and against petitioner (R. 14) and the clerk complied with that order (R. 14).

The only exception that was filed by the United States Attorney was to the action of the District Court in adjudging the affidavit of defense to be sufficient (R. 15).

It has been uniformly held that the Circuit Court of Appeals has appellate jurisdiction to review only final decisions in the class of cases to which the present one belongs. The provision of the Judicial Code in question reads as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error filed decisions." U. S. C. A., Title 28, Sec. 225, Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 936.

An order discharging a rule for judgment for want of a sufficient affidavit of defense is not a final decision and hence is not appealable.

In SHUMAKER v. LIFE INSURANCE COMPANY, 159 Fed. 112, this question came before the Circuit Court of Appeals for the Third Circuit and the court there said at page 113:

"We cannot assent to the suggestion of counsel that section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) (the conformity act) would justify the assumption by this tribunal of the jurisdiction which the Pennsylvania Act of April 18, 1874 (P. L. 64), imposed upon the Supreme Court of that state. That section refers in terms to Circuit and District Courts, and to the state within which such courts are held. It is inapplicable to a subsequently created appellate court for a circuit comprising several states. Moreover, it requires conformity with state law and practice only in whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, and not even in such matters where Congress itself has legislated upon the subject and prescribed a rule. A question of jurisdiction is not within the categories mentioned; and upon the subject of reviewable judgments Congress, as we have seen, has legislated and prescribed the rule. Amy v. Watertown, 130 U. S. 305, 9 Sup. Ct. 530, 32 L. Ed. 946.

We may be permitted to add that this particular statute has not proved to be satisfactory to the courts of the state by which it was enacted, and were we at liberty to adopt it the experience of those courts would deter us from doing so. Radcliffe v. Herbst, 135 Pa. 574, 19 Atl. 1029, was an appeal to the Supreme Court of Pennsylvania from the refusal of the court below to enter judgment against the defendants for want of a sufficient affidavit of defense, and in deciding it the reviewing court said:

'The language of this court in Griffith v. Sitgreaves, 81 Pa. 378, is so applicable to the class of cases that I quote it here: "The act of assembly authorizing writs of error to be taken when a court of common pleas refuses to enter judgment on the ground of the sufficiency of an affidavit of defense

was intended to reach only clear cases of error in law, and thus to prevent the delay of a trial. Its effect is often to produce two writs of error in the same cause, instead of one, and is not to be encouraged.'' ''

The discharge of the rule for judgment leaves the case at issue, ready for trial, where all questions may be finally determined by judgment for plaintiff or defendant.

In Pennsylvania the discharge of a rule for judgment for want of a sufficient affidavit of defense is only appealable by reason of the special Act of Assembly referred to in the *Shumaker case, supra,* and is an exception to the general law that appeals may be taken only from final decisions. In the absence of similar Congressional legislation the jurisdiction of the Circuit Court of Appeals cannot be extended over such interlocutory orders as the discharge of a motion for a summary judgment.

A review of the assignments of error (R. 16, 17) clarifies our point.

The first nine Assignments of Error scarcely need the court's attention inasmuch as they are but quotations from the reasoning in Judge Kirkpatrick's opinion. They refer to no action taken by the court nor to any appealable error committed by the District Judge.

Assignment No. 10 is to the refusal of the Trial Judge to make absolute the rule for judgment. As set forth in the *Shumaker case, supra,* this is not an appealable error.

Assignment No. 11 is simply the converse of Assignment No. 10 and is answered in the same way.

Assignment No. 12 is to the discharge of the rule for judgment and also comes under the principle of the *Shumaker Case.*

Assignment No. 13 is to the Trial Judge's direction for the entry of judgment for the defendants. It is sufficient to say in answer to this assignment that no such

order was made by the Trial Judge. The judgment was voluntarily entered by the United States Attorney when the case was at issue upon Statement of Claim and Affidavit of Defense. There is no appeal from a judgment or decree entered voluntarily by the party appealing. UNITED STATES v. BARRETT, 104 U. S. 767, is directly in point and as the opinion of Mr. Chief Justice Waite is short we quote it in full.

> "The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer in the Army of the United States, under the provisions of the Act of 1878, ch. 263, sec. 7, 20 Stat. at L., 145, Sup. R. S., 362, his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that after the decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal.
>
> In *R. R. Co. v. Ketchum*, 101 U. S. 289, we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion this case comes within that rule. The consent to the judgment below was in law, a waiver of the error now complained of."

See also DRAINAGE DIST v. R. R., 163 Fed. 836, 837, and HODGESON v. VROOM, 266 Fed. 267, 269.

Assignment No. 14 is to the Trial Judge's action in adjudging the affidavit of defense sufficient and Assignment No. 15 is the converse thereof. Both of these assign-

ments are likewise ruled by the principle announced in the *Shumaker Case*.

It is therefore submitted that if respondent has appealed from the discharge of the rule for judgment, as his exception would imply, the appeal is from an interlocutory decision.

If on the other hand it is from the judgment entered at the order of his own attorney when the case was at issue, it is a judgment by consent, which cannot be the foundation for an appeal.

If the court should be of the opinion that the appeal was properly taken and that there were any assignments of error which the Circuit Court of Appeals had jurisdiction to consider, the next obstacle to the present suit is:

II. THE PRESENT PETITIONER HAS NO STANDING IN THIS CASE BECAUSE OF TWO FAILURES TO COMPLY WITH THE ABATEMENT ACT.

The petitioner admits that "the former suit by McCaughn was properly abated since no substitution was made within six months after the expiration of his term as provided by statute". It follows that the present petitioner is not properly a party to this case.

MacLaughlin was the original plaintiff in the present case. He died in June 1933 and in July 1933 a suggestion of his death was filed. Thereafter the United States Attorney proceeded in the name of Ladner, the next collector, although it was never shown to the court that there was need of continuing the action, nor was any permission for the substitution obtained from the court.

On October 16, 1933, after the certiorari had been granted, a suggestion of the resignation of Ladner and the substitution of Fix was filed in this court.

Respondent was not notified of the presentation of either of these suggestions nor was it given opportunity

to present an objection. The District Court did not even pass upon the first substitution. Both of the attempted substitutions therefore offend section 11 (c) of the Act of Feb. 13, 1925, c. 229, 43 Stat. 936, which prescribes the only terms upon which the substitution may be made.

> "(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

This clause expressly states the condition precedent to substitution. The petitioner has failed to comply with the Act which is the only authority for the substitution. The suggestions therefore have no legal effect and there is no person legally competent to appear as the party plaintiff in this suit.

The terms of the Act of 1925 have been carried into the rules of this court as Rule 19, sec. 4:

> "4. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in a federal court, either of first instance or appellate, the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

The petitioner attempts to explain his failure to comply with the Act and the rule of this court, in the footnote on page 4 of his brief, by saying that the United States Attorney at Philadelphia advises that the substitution of Ladner by a simple suggestion and without notice

to the opposing party or permission of the court, is in accordance with the Pennsylvania State practice.

The petitioner is evidently relying upon the conformity act to sustain the contention that this method of substitution is sufficient and that he may follow the state practice rather than the procedure required by the Act of Congress.

This argument has been ruled upon to the contrary so many times that it is not open to question.

As stated by Mr. Justice Gray in SOUTHERN PACIFIC R. R. v. DENTON, 146 U. S. 202, 209 (1892):

> "And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter."

In LUXTON v. BRIDGE CO., 147 U. S. 337, 338 (1892), the same Justice said:

> "This direction that the proceedings in the Circuit Court of the United States shall 'conform as nearly as may be to the practice in the courts of the State' must, of course, like the corresponding direction as to practice, pleadings and procedure in section 914 of the Revised Statutes, give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress."

See also INDIANAPOLIS & ST. L. R. R. v. HORST, 93 U. S. 291; CHATEAUGAY CO., petitioner, 128 U. S. 544; EX PARTE FISK, 113 U. S. 713, 721; WHITFORD v. CLARK COUNTY, 119 U. S. 522.

But even if the State practice were permissible, we find that the statement of the United States Attorney is

erroneous, for the Pennsylvania Act and the Act of Congress are practically identical.

The Act of the Legislature, April 4, 1919, Pamphlet Laws 35, sec. 1, provides as follows:

> "Be it enacted, &c., That no suit, action, or other proceeding, at law or in equity, lawfully commenced heretofore, now pending, or which may hereafter be commenced, by or against the head of any department or bureau, or other officer, of the Commonwealth of Pennsylvania, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office, but in such event the court, on motion or supplemental petition, filed at any time within twelve months, thereafter, showing a necessity for the survival thereof, may allow the same to be maintained by or against his successor in office. And the court may make such order as shall be equitable for the payment of costs."

No doubt the United States Attorney was referring to the practice in Pennsylvania in suits between private citizens. In such cases the procedure is governed by the Act of June 7, 1917, Pamphlet Laws 447, sec. 35 (a) as amended by the Act of March 30, 1921, P. L. 55, sec. 1, which permits the substitution of the personal representative of a deceased party without the requirement of notice to the other party or permission of the court. This act is the same in all essentials as the Act of Congress governing the substitution of private parties to suits in the Federal Courts. (Rev. Stat. sec. 955; Nov. 23, 1921 c. 142 secs. 1, 2, 42 Stat. 323, 324; (U. S. C. A. sec. 778).)

Thus it is unnecessary to inquire into the Pennsylvania practice or the Conformity Act. The question is whether the Act of Congress of 1921 governing suits between private parties, or the Act of 1925 which expressly legislates concerning suits by public officials, controls the procedure to be followed. There can be only one answer. The particular legislation referring to suits by officers takes precedence over the general legislation and is exclusive in the field which it covers.

The truth of this conclusion is confirmed when it is considered that the Act of 1921 and the Pennsylvania Act for substitution of private parties, provide only for the substitution of the personal representative of the deceased party. It was not the personal representative who was substituted in this case, but the successor in office. There is no authority of any kind for his substitution except the Act of 1925 and hence the requirements of that Act must be followed before the case can proceed.

III. THE ABATEMENT OF THE PRIOR ACTION ABATED ALSO THE CAUSE OF ACTION.

The petitioner has correctly given the history of the legislation contained in the Acts of 1899 and 1925. The Act of 1899 was inspired by this Court's opinion in U. S. EX REL. BERNARDIN v. BUTTERWORTH, 169 U. S. 600, wherein it was pointed out that legislation should be passed to permit an action of mandamus to be continued against the successor in office, when he persisted in the allegedly illegal conduct of his predecessor. It is also true that the discussion in the House upon the bill was centered around this phase of the problem.

The petitioner argues from this that the sole purpose of the Abatement Act was to permit the continuance of mandamus and habeas corpus proceedings, which by their nature must be suits *against* public officials.

The Act in its title as well as its body legislates concerning actions *by* as well as *against* officers of the United States. Thus, while the opinion in the *Butterworth Case* was probably what brought before Congress the need of remedial legislation, we cannot say that Congress intended to, or did, limit the necessity for prompt substitution to actions of mandamus and habeas corpus. The Act itself prevents such conclusion by referring to actions *by* officers, actions which could not be in the nature of mandamus or habeas corpus, but must, of necessity, be for the enforcement of some such right of action as is alleged in the present case.

The petitioner also argues that the Abatement Act is merely permissive legislation and not mandatory, citing EX PARTE PRADE, 289 U. S. 444, and BROWN-CRUMMER CO. v. CITY OF FLORALA, 55 Fed. (2nd) 238. The former case arose by reason of a bill to enjoin the threatened enforcement by a state officer of an unconstitutional statute. Upon his retirement from office the plaintiff sought to substitute his successor and this court held that the substitution was not proper, at least without a showing that there had been some threat by the successor to continue the illegal conduct. The Abatement Act was therefore held not applicable. In the course of the opinion Mr. Justice Butler said that the act was permissive in that it did not require, but merely authorized the court to substitute. From this point of view the act is permissive. But that is far from saying that the cause could be continued *without* a proper substitution. The granting of permission to substitute is discretionary (probably within certain limits), but a substitution there must be, if the cause is not to abate. It was so held in U. S. v. CURRAN, 276 U. S. 590 in which the per curiam opinion was,

> "It appearing that Henry H. Curran, sued herein as Commissioner of Immigration, resigned such office on March 31, 1926, and was succeeded by Benjamin M.

Day, who now holds that office, and that no motion was made under par. 11 of the act of February 13, 1925 (c. 229, 43 Stat. 936, 941), 'asking the Court to 'permit the cause to be continued and maintained by or against the successor in office of such officer,' and, that the six months' period, within which such a motion could have been made, has expired, the Court now vacates the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with a direction to dismiss the cause as abated.''

And in LE CRONE v. McADOO, 253 U. S. 217, 219, this Court speaking by Mr. Justice Holmes reached a similar conclusion.

> "But we cannot consider that question or the other arguments upon the merits of the case, because, Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, c. 121, 30 Stat. 822."

For the purpose of this case the Act is clearly mandatory. Indeed petitioner's admission that the first suit was properly abated, necessarily includes an admission that the act is mandatory. For otherwise the first suit should not have been stricken off for failure of the plaintiff's successor to comply.

The petitioner has referred to BOWERS v. AMERICAN SURETY CO., 30 Fed. (2nd) 244 as holding that bonds of the nature of that in suit are obligations running in favor of the collectors as they succeed each other. This was a suit by Bowers, collector, upon a bond given to his predecessor. No prior suit had been brought. Judge Hand in his opinion recognizes that the right of a succes-

sor in office to sue upon a specialty given to his predecessor is doubtful. He then cites the Abatement Act and reasons that if Congress thereby permitted the successor to be substituted upon the death of the original obligee *pendente lite*, Congress must have intended that the successor could bring the suit if one had not been commenced during the term of the obligee.

The right of the successor to sue was therefore held to have arisen by implication from the Act of 1925 and the Act of 1899 which it modified, and without that legislation it seems most doubtful that by the common law, the successor could have sued upon the specialty. If these Acts are the basis of the right to sue, it follows that there is no right unless the Act is complied with. Upon failure to comply the right to sue is lost. For, if the right of the successor arises only from the Act, that right cannot survive independently of the Act. And if the permission to sue is confined by a definite mode of procedure, the right to sue without compliance cannot be presumed.

The petitioner has cited the following cases for the proposition that the abatement of this suit does not defeat the cause of action. They shed little light upon the question before the court.

MARTIN v. BALT. and OHIO R. R., 151 U. S. 673, was a case, decided under the Statutes of West Virginia, which provided that an action for personal injuries abates upon the death of the parties. It was held the cause of action abated upon death.

MACKER v. THOMAS, 7 Wheat. 529 and GREEN v. WATKINS, 6 Wheat. 260 were real actions (writs of right) and it was held that the writs abated upon the death of a party, that the heir could not be substituted, but that a new action must be brought. The reason is that a new cause of action arises in the heir. As stated by Mr. Justice Story in the latter case,

"All personal actions by the common law abate; and

it required the aid of some statute, like that of the thirty-first section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the life-time of the party."

ELLIOTT v. TEAL, Fed. Cas. No. 4389 was decided under the laws of Oregon and the original suit was held not abated by a transfer of title to the real estate involved. No question was raised in this case as to a new suit, for the first was not abated.

WARREN v. FURSTENHEIM, 35 Fed. 691 was a motion to revive—that is, to continue—an action for personal injuries after the death of the defendant. It was held that the Statutes of Tennessee saved such suits from abatement if suit had been brought before death, and the action was not abated. This decision does not touch upon the right to bring a new suit after the first has been abated for failure to comply with the act which permitted the substitution.

In HARRISON v. FIRE INS. CO., 102 Iowa 112, a suit had been prematurely brought and upon a plea in abatement a verdict was directed for the defendant. A Statute of Iowa permitted a new suit which we submit the common law also would allow. The same may be said of ST. ROMES v. COTTON PRESS CO., 127 U. S. 614 in which the first case was dismissed for want of proper parties. These cases are no authority for the present case in which the original action was properly brought and where the controversy could have been concluded but for the defendant's failure to keep it alive.

PITTS v. BANK, 121 Ill. 582, was a question of formal common law pleading. It was held that the plea that the note in suit was not due was not in proper form for a plea in abatement and therefore judgment was entered for plaintiff. No question was raised in that case about the survival of actions and we cannot conceive the purpose for which it was cited.

This court has never decided whether the abatement caused by the failure to substitute as provided by the Act of 1925 abates the cause of action or only the particular action. The only decision upon this question that we have found is KUTTROFF v. SUTHERLAND, 49 Fed. (2nd) 944, D. C. N. Y. in which it was held:

> "The defendant Frank White resigned as Treasurer of the United States on April 30, 1928. No application has ever been made for the substitution of any of his successors, and, it being more than six months since he resigned, the suit against the Treasurer of the United States has abated and cannot be revived against the present Treasurer." (Citing the Act of 1925.)

The petitioner has argued that the new suit may be brought because the cause of action, being ex contractu, survives the death of the obligee. Of course, the Act of 1925 would not have the effect of continuing causes of action which abated by death. It is concerned only with those causes of action which do survive and provides the method to be followed in order to accomplish this purpose. If it be admitted that the cause of action upon this bond survived the death of the obligee, it is still true that prior to the Act of 1899 there was no method for its enforcement by suit. The personal representative could not have sued and there was no authority known to the common law whereby the successor in office could have brought the ac-

tion. It must follow that the suit upon the bond must comply with the terms of the Act which permits what the common law denied.

The Supreme Court of Vermont has so held in BENSON v. CRAIN, 91 Vt. 44, 99 Atl. 255 in an opinion by Mr. Justice Taylor,

> "It is unnecessary for the purposes of this inquiry to consider what becomes of plaintiff's *cause of action* against the deceased defendant. The question for decision relates to the survival, or perhaps, more accurately speaking, to the revivability, of a suit that would abate at common law. Inasmuch as the revival of an action at law is purely statutory in its origin, the mode provided by statute is exclusive; that is to say, it is revivable only in the manner and to the extent provided by the statute."

The petitioner argues that Congress could not have intended that the cause of action abate with the abatement of the first suit. But if the right of action normally survives the death, and if it passes to the successor, why should Congress have limited the time of substitution? If it was to be permissible for the successor to bring a new action upon the abatement of the former one, why should Congress place a time limitation upon the right to substitute in the first suit? It is as useless to harass the plaintiff by providing for the abatement of his suits from time to time, without affecting his cause of action, as it is to require the defendant to defend many suits upon the same cause of action, when such a simple procedure is offered for the continuance of the original action to a conclusion.

The petitioner has cited the two *Claussen* cases and the two *Cunningham* cases at page 15 of his brief for the proposition that the abatement of the first suit for failure to substitute does not prevent a new action. The second suit in each of these cases was predicated upon the new and

independent action of the succeeding defendant officer, and the cause of action which was the basis of the second proceeding was not in existence at the time of the first suit. It is apparent that the relator in those cases might bring his second suit for his new cause of action. Therein those cases differ in principle from the present one, in which the cause of action, the bond in suit, was the same in both cases. But it has always been held that actions of mandamus and habeas corpus against officials were personal actions against them and were not directed against the office which they held.

Petitioner has also argued that the holding of the courts below imposes a time limitation upon the enforcement of bonds to insure payment of taxes and that Congress could not have so intended. If the decision in *Bowers v. American Surety Co., supra, is correct,* there is no limitation upon the time within which the first suit may be brought. When Congress has placed a two year statute of limitation upon the tax itself, it is entirely comprehensible that it should prescribe an orderly procedure by the correct party to collect the revenue represented by the bond, and abate the cause for refusal to follow the simple method which was required, within a time limit which is ample.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

WALTER BIDDLE SAUL,
THOMAS P. MIKELL.

SUPREME COURT OF THE UNITED STATES.

No. 153.—October Term, 1933.

Alvin F. Fix, Collector of Internal Revenue for the First Collection District of Pennsylvania, Petitioner,
vs.
Philadelphia Barge Company a[illegible] tional Surety Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January [illegible]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action originally brought by MacLaughlin, a collector of internal revenue, in a federal district court, against respondents, to recover on a bond conditioned for the payment of such income taxes assessed against the Barge Company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue. The obligee named in the bond is Ephraim Lederer, collector of internal revenue when the bond was executed, "or his successors." MacLaughlin having died, the case was first revived in the name of Ladner, and upon his resignation, in the name of petitioner. All three, in turn, succeeded to the office held by Lederer.

In the district court the surety company filed an affidavit of defense, incorporating a plea that the cause of action upon the bond had abated, and had been lost, by failure to comply with § 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941; U. S. C., Title 28, § 780. In support of that contention, the plea alleges that suit in assumpsit on the same bond had been brought by one McCaughn, the first successor of Lederer; that, pending the suit, McCaughn resigned as collector; that judgment nevertheless was thereafter entered in his favor; and that, subsequently, upon a suggestion of abatement of the cause of action, an order was entered striking the judgment from the record by reason of the fact that the action upon which the judgment was rendered had abated prior to the entry thereof.

The district court held that since one suit, brought by a successor of the original obligee, had abated by reason of the failure of the government to make substitution under the act of 1925, there resulted an abatement of the cause of action as well as of the writ. 60 F. (2d) 333. Upon the basis of this ruling and upon a præcipe filed by the United States attorney, final judgment was entered against the collector, which judgment was affirmed by the circuit court of appeals. 63 F. (2d) 25.

Respondents raise some question as to the right of the government to appeal to the court below, but the point is so obviously without merit that we do not stop to state or discuss it.

Section 11 of the act of 1925, so far as pertinent, provides that where, during the pendency of an action brought by or against an officer of the United States, relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court where the action is pending, "to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." The original act on the subject, of which the act of 1925 is an amplification, was passed February 8, 1899, c. 121, 30 Stat. 822, evidently in response to a suggestion of this court in *U. S., ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600, decided in 1898. See *Murphy* v. *Utter*, 186 U. S. 95, 101; *Caledonian Coal Company* v. *Baker*, 196 U. S. 432, 440-442; *Irwin* v. *Wright*, 258 U. S. 219, 222. In the *Butterworth* case it was held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the commissioner; and that it could not be revived in the name of his successor, even with the latter's consent. The court suggested that in view of the inconvenience occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that in such cases it should be lawful for the successor in office to be brought into the case. The purpose of the act, as explained in the House committee report (H. Rep. No. 960, 55 Cong., 2d Sess.), and by the member of the House who reported the bill from the committee (Cong. Rec., Vol. 31, Pt. 4, pp. 3865-3866), was to permit the

suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office.

The act is purely remedial, designed to remove what this court in the *Butterworth* case called an "inconvenience." Failure to comply with the statute forecloses the particular remedy therein provided; it does not destroy the right. There is a clear difference between the action and the *cause* of action. Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending upon its nature and the applicable rule. See *Sanders' Adm'x* v. *Louisville & N. R. Co.*, 111 Fed. 708, 710; *Martin* v. *Wabash R. Co.*, 142 Fed. 650, 651. Compare *Green* v. *Watkins*, 6 Wheat. 260; *Henshaw* v. *Miller*, 17 How. 212, 219; *Warren* v. *Furstenheim*, 35 Fed. 691, 695. The vice of the ruling below, and of the argument here in support of it, is the failure to give effect to this distinction. The present bond runs to each successor, as it ran to the original obligee and with like effect; and, notwithstanding the termination of the latter's possession of the office, the cause of action which arose in his favor survives for appropriate enforcement by his several successors. *Tyler* v. *Hand et al.*, 7 How. 573; *Bowers* v. *American Surety Co.*, 30 F. (2d) 244. This accords with the policy of the revival statute, as observed by Judge L. Hand in the case last cited. A conclusion to the contrary would subvert the purpose of the bond, which "is to create an obligation in favor of the incumbents, as they succeed each other."

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.